Supreme Court, U.S.

No.: 01 1870 JUN 21 2002

OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

ADRIENNE COBB, EDDIE OLIVER, TOMMY PERKINS, and NATHALAN PERKINS, *Petitioners*,

v.

ROBERT ROSHTO, RAYMOND E. HOLLOWAY, TERRY E. PITRE, MURPHY J. PAINTER, SAM GARAFOLA, UNKNOWN AIMEE, Agent, JEFF WESLEY, SCOTT JONES, and THE CITY OF DENHAM SPRINGS, LOUISIANA, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari

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49pgs

QUESTIONS PRESENTED

I. May a federal court abuse its discretion in declining to exercise its jurisdiction pursuant to 28 U.S.C.A. § 1367?

II. May a federal court automatically grant a motion for summary judgment without acknowledging that the moving party met its burden of demonstrating that no genuine issue of material fact existed and that it was entitled to judgment as a matter of law?

III. Must a final adjudication of an administrative proceeding be reached before a Plaintiff may claim relief pursuant to 42 U.S.C.A. § 1983?

IV. May a public official's refusal to comply with a court order be excused under the defense of qualified immunity?

PARTIES TO THE PROCEEDING

The following individuals are parties to the proceeding in the court below:

Adrienne Cobb, Eddie Oliver, Tommy Perkins, Nathalan Perkins; *Plaintiffs-Appellants*;

Robert Roshto, Raymond Holloway, Terry E. Pitre, Murphy J. Painter, Sam Garafola, Agent Mike Aimee, Jeff Wesley, Scott Jones, City of Denham Springs, Louisiana; *Defendants-Appellees*.

CORPORATION DISCLOSURE STATEMENT

No parties hereto are corporations. Sup. Ct. R. 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Adrienne Cobb, Eddie Oliver, Tommy Perkins, and Nathalan Perkins respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the Court of Appeal for the Fifth Circuit (App. A) and the District Court for the Middle District of Louisiana (App. B) are not yet reported.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 26, 2002. (App. A). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution provides that no "State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Const. Amend. XIV. Further, 42 U.S.C.A. § 1983 provides that every person acting under color of any statute, who causes any individual to be deprived of rights, privileges, or immunities, is liable to the injured party. 42 U.S.C.A. § 1983. Additionally, 42 U.S.C.A. § 1985 prohibits two or more persons from conspiring with the intent to deny to any citizen the equal protection of the laws. 42 U.S.C.A. § 1985.

28 U.S.C.A. § 1367 provides that, "in any civil action of which the district courts have original

jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." The court's decision to decline jurisdiction is discretionary, not mandatory. 28 U.S.C.A. § 1367.

STATEMENT OF THE CASE

For approximately thirty years, Petitioner Tommy Perkins has owned a premises located at 436 Summer Street in the city of Denham Springs, Louisiana. Since approximately 1974, said Mr. Perkins has held a permit to sell alcoholic beverages thereupon.

On said premises stand two separate buildings. The building which stands nearer to the street was divided so as to accommodate two businesses. The addresses of said businesses, hence, became 436 A Summer Street and 436 B Summer Street. 436 A Summer Street was leased to Bay Lane, Inc., a corporation owned by Mr. Tommy Perkins through which he operated a restaurant and bar. The remaining portion of this building, 436 B Summer Street, housed Mr. Perkins' private office from which he operated a motel, which was also located on the premises.

I. The First Denial.

In 1992, Mr. Perkins sold 436 A Summer Street to his son-in-law, Larce Spikes, who obtained a permit authorizing him to operate the restaurant and bar. This portion of the property was again sold, in 1993, to Petitioner Eddie Oliver. However, upon Mr. Oliver's attempting to secure a license to serve alcoholic beverages, the Office of Alcoholic Beverage Control, (hereinafter referred to as "ABC"), a division of the Department of Public Safety and Corrections of the State

of Louisiana, denied his application alleging that the premises for which the application was sought was within three hundred feet of a playground and, thus, by ordinance, he was prohibited from selling alcoholic beverages at that location.

This denial was appealed to Louisiana's Twenty-First Judicial District Court, at which time the ABC entered into a stipulation that the premises, at that time owned by Mr. Oliver, was greater than three hundred feet from the playground. Judgment to that effect was entered by said state district court, and no appeal was taken therefrom by any party.

II. The Second Denial.

On or about January 13, 1995, Mr. Oliver sought, again, to renew his license for Oliver's Restaurant and Lounge. Thereafter, he, again, received a denial from the ABC for the stated reason that the premises in question was within three hundred feet of a playground. As with the previous denial, this matter was appealed to the same state district court, which ruled this issue *res judicata*, in light of its previous judgment. Thereafter, the ABC appealed the district court's ruling to Louisiana's First Circuit Court of Appeal.

The state court of appeal affirmed the district court's ruling that the issue of the distance between Mr. Oliver's premises and the playground was in excess of three hundred feet. Rehearing was denied on March 29, 1996.

During the pendency of this matter and the appeals taken therefrom, Mr. Oliver's business was forced to remain closed. Thus, in April of 1996, Mr. Oliver sold the premises back to Mr. Tommy Perkins.

III. The Retaliatory Harassment.

In April of 1996, the ABC contacted Mr. Perkins, who was, once again, the owner of the premises, and

informed him to apply for a liquor license, assuring him that there would be no opposition from the ABC. This communication was followed by a meeting in which ABC's counsel and an agent thereof met with Mr. Perkins and his office manager. During this meeting, the ABC represented to Mr. Perkins that there would be no problems in the application process and that they would assist him in his efforts. That same month, Mr. Perkins sold the business to his granddaughter, Petitioner Adrienne Cobb, who subsequently sought a permit from the state ABC as well as the City of Denham Springs Office of Alcoholic Beverage Control.

On April 29, 1996, the state ABC petitioned the Louisiana State Supreme Court for a supervisory writ to review the decision of the state appellate court, thus reopening the issue of the distance between the premises and the playground. That same day, Respondent Agent Mike Aimee of the ABC presented himself, unannounced, at the premises and, without a warrant, demanded access.

During this purportedly "official stop," Agent Aimee entered 436 B Summer Street, which, as previously stated, is a motel owned by Mr. Perkins and also includes Mr. Perkins' private office. Agent Aimee ordered that certain doors and locked cabinets in Mr. Perkins' office be opened. He further ordered that the motel rooms be opened as well.

Labeling his findings as "contraband," Agent Aimee summoned the Denham Springs Office of Alcoholic Beverage Control to seize the liquor found in Mr. Perkins' office during the search. Mr. Perkins was issued three summonses to appear before the Denham Springs City Court for three alleged violations of Louisiana's statute regarding alcoholic beverages. Mr. Perkins was also, on April 29, 1996, ordered by the Denham Springs ABC to appear on before Respondent Jeff Wesley, the chairman, and other persons representing and/or purportedly acting on behalf of the

City of Denham Springs ABC. It should be noted that the search and seizure by Agent Aimee was later ruled unconstitutional as the items seized were not found on the licensed premises and did not form a basis for any charges against Mr. Perkins. Thus, the criminal proceedings against Mr. Perkins were quashed on January 7, 1997. The state district court further ordered that the items seized from the illegal search in April of 1996 be returned. As late as March of 1997, Respondent, Chief Jeff Wesley of the City of Denham Springs Police Department refused to comply with this order.

After being ordered a second time to return the seized liquor, Chief Wesley continued to resist. It then became necessary for Mr. Perkins' counsel to travel to the Denham Springs Police Station to convince them to release Mr. Perkins' property.

On May 1, 1996, the Denham Springs ABC held its first administrative hearing on its sanctioning of Mr. Perkins. Testimony was taken from Agent Mike Aimee. However, due to the inadequacy of the notice given to Mr. Perkins, the hearing was continued until May 7, 1996. On that date, the Denham Springs ABC held its second such hearing, which was similarly continued until May 28 of that year. In the interim, on May 9, 1996, Agent Aimee returned to the 436 A Summer Street address to, once again, investigate Ms. Cobb's business.

On May 20, 1996, Ms. Cobb submitted her application for her liquor license, having completed paperwork for both the Denham Springs and the state offices of alcoholic beverage control. It should be noted, at this point, that one of the established justifications for the denial of a permit is an unsuitable criminal record.

On May 21, the day after submitting said application, Respondent Lieutenant Scott Jones, while acting under color of state law, obtained a search warrant, upon his own affidavit, to search Ms. Cobb's

home. According to said affidavit, a reliable confidential informant, one Charles Ray Scott, had given a tip that Ms. Cobb was selling crack cocaine from her home and that this informant had purchased cocaine from her using a marked twenty-dollar bill issued to him on that date. However, the signature used on the informant's statement did not match his signature on other statements given to police in other matters. Further, the allegedly marked twenty-dollar bill was not available for production.

When deposed, Charles Ray Scott, the alleged confidential informant upon whose statement Lieutenant Jones' affidavit for the search warrant was based, testified that he had never purchased cocaine from Ms. Cobb. He further testified that he had never told Lieutenant Jones that he had purchased cocaine from her.

Pursuant to this warrant, Lieutenant Jones apprehended Ms. Cobb as she was on a public highway in an automobile being driven by a friend. This stop was not made on the premises of Ms. Cobb's home. When she informed Lieutenant Jones that she did not intend to go home, she was threatened with arrest for resisting arrest. Thereafter, Ms. Cobb was handcuffed and forced into Lieutenant Jones' patrol unit. She was then transported, against her will, to her home, wherein a search was commenced after Lieutenant Jones took her keys. No warrant was ever presented to Ms. Cobb. Further, Ms. Cobb was never advised of her *Miranda* rights, informed of why she was arrested, or afforded an opportunity to obtain counsel.

Pursuant to this search, Lieutenant Jones claimed to have found narcotics; he then proceeded to arrest Ms. Cobb, who posted bond later that evening. This situation presented significant humiliation to Ms. Cobb, whose mother is an employee at the jail.

On May 22, 1996, Agent Aimee returned to Ms. Cobb's premises at 436 A Summer Street to allegedly

sketch a floor plan. While there, he mentioned to Ms. Cobb that he had heard that she had been arrested the night before. He informed her that he was going to have to issue the license to her, but, if she were found guilty of the charges, she would lose the license. On October 24, 1996, the Office of the District Attorney rejected the charges against Ms. Cobb due to a lack of evidence.

On May 31, 1996, the Louisiana Supreme Court denied the state ABC's writ application on the matter in which Mr. Oliver had sued regarding the *res judicata* issue of the distance between the premises at 436 A Summer Street and the public playground. On June 3, 1996, the City of Denham Springs ABC issued its formal notice of a hearing to determine whether the retail dealer's alcohol permit should be suspended or revoked, citing the statutory violations under which the City had initially brought criminal proceedings against Mr. Perkins. Mr. Perkins objected on various grounds including the City of Denham Springs ABC's lack of statutory authority to proceed. On June 20, 1996, Mr. Perkins made a final appeal to the mayor of Denham Springs to reset the hearing, which had been set for June 24, due to the fact that Mr. Perkins' counsel was unavailable on that date. This request was denied.

On June 21, 1996, Mr. Perkins was able to obtain a temporary restraining order against the City of Denham Springs ABC enjoining them from taking any further action against him. However, by operation of law, this order lapsed on July 1, 1996. On July 16, 1996, the matter was further continued until August 13, 1996.

On July 23, 1996, Mr. Perkins obtained a second temporary restraining order against the Denham Springs ABC enjoining them from taking any further action against him while he was waiting for a hearing for a final injunction. On September 23, 1996, the state district court granted such a final injunction against the Denham Springs ABC, finding that the Denham Springs

ABC was not authorized by law to act. As a result of the court's finding that it was illegally constituted, the Denham Springs ABC disbanded, and all proceedings initiated against Mr. Perkins were discontinued.

Pursuant to Louisiana's Revised Statute 26:87, the state ABC and the City of Denham Springs were required to act on Ms. Cobb's application within thirty-five days of its May 20, 1996 submission. Ms. Cobb and Mr. Perkins contacted the state ABC and the City of Denham Springs on numerous occasions seeking action on the application. On August 15, 1996, Ms. Cobb received a letter from the state ABC, once again, denying her permit on the stated basis that her business was too close to a public playground. On August 21, 1996, Mr. Perkins and Ms. Cobb were forced to seek a writ of mandamus compelling the state ABC and the City of Denham Springs to act.

On September 23, 1996, the state district court issued the writ of mandamus to the City of Denham Springs to act on the application. Thereafter, the mayor and the board of aldermen granted the permit; however, on October 23, 1996, despite the City's granting of the permit, the City of Denham Springs appeared and participated in the appeal of the state ABC's denial of the application. At the close of the hearing on this matter, the state court concluded that there was no evidence presented to support the allegation that 436 A Summer Street was less than three hundred feet from the playground. The court further assessed costs equally to the state ABC and to the City of Denham Springs; however, for some two years, the City refused to pay said costs.

On December 5, 1996, the state ABC granted her permit. This was followed by the City of Denham Springs' granting of a permit on December 10, 1996.

On February 25, 1997, Petitioner Nathalan Levon Perkins, daughter of Petitioner Tommy Perkins, was employed by Ms. Cobb and was working at A.C.'s

Restaurant and Lounge, which was operating from the 436 A Summer Street premises. During the evening hours, Ms. Perkins took a break and went to a nearby McDonald's for a meal. While at McDonald's, she was apprehended by Respondent Lieutenant Jones and forced to accompany him back to A.C.'s to get her keys and then to her home, for which he had obtained a search warrant, purportedly based upon information provided to him by a confidential informant, again, Mr. Charles Ray Scott, who was supposed to have purchased crack cocaine from Ms. Perkins. Similar to Lieutenant Jones' apprehension of Ms. Cobb, Ms. Perkins was never advised of her *Miranda* rights, informed of why she was arrested, or afforded an opportunity to obtain counsel.

When Lieutenant Jones and the six other police officers arrived at Ms. Perkins' home, they went on a two-hour rampage throwing clothing from drawers and otherwise disrupting the home. At one point, Lieutenant Jones discovered a photograph of Ms. Perkins in the nude; he then called the other officers in to view it, further humiliating her. This was compounded by lewd comments made to Ms. Perkins by another of the officers after viewing the photograph. It should be noted that no crack cocaine was found.

Being that a mostly burnt marijuana joint, or "roach" was found in this illegal search, Ms. Perkins was handcuffed and transported to jail. Upon arrival, she was confined to a pole for approximately three hours during which she was told that, just because she was a Perkins, she did not have special privileges, and that she was going to jail.

Thereafter, Lieutenant Jones repeatedly failed to appear in court proceeding pertaining to the prosecution of Ms. Perkins. This resulted in the dismissal of the charges that had been brought against her as a result of her arrest by Lieutenant Jones.

IV. The Proceedings Below.

On July 9, 1998, Adrienne Cobb, Eddie Oliver, Tommy Perkins, and Nathalan Perkins instituted suit asserting violations of civil rights by the City of Denham Springs, Chief Wesley, Lieutenant Scott Jones, the Office of Alcoholic Beverage, Robert Roshto, et al. On August 10, 1998, the action was re-allotted from Judge Polozola to Judge Ralph Tyson. On June 29, 1999, an order was entered establishing final deadlines.

On November 8, 1999, due to the death of Petitioner Eddie B. Oliver, his living heirs were allowed to substitute as party plaintiffs. On November 15, 1999, Mr. Roshto was granted an extension of time to file a motion for summary judgment because discovery was incomplete.

On November 30, 1999, Mr. Roshto filed a Motion for Summary Judgment alleging prescription, failure to state a constitutional violation, insufficient relation between acts to allege violations of constitutional rights, and qualified immunity. On January 27, 2000, Plaintiffs filed an opposition to Mr. Roshto's motion asserting genuine issues of material fact and challenged Mr. Roshto's defense of qualified immunity.

On February 24, 2000, this action was reassigned to Judge Peter H. Beer and transferred to the district court for the Eastern District of Louisiana.

On March 30, 1999, the City of Denham Springs, Jeff Wesley and Scott Jones were granted leave to file a 40 page memorandum for motion for partial summary judgment. On March 24, 2000, the City of Denham Springs, Jeff Wesley and Scott Jones filed a motion seeking partial summary judgment. On March 31, 2000, Petitioners, in turn, sought an extension to respond to the summary judgment, asserting the excessiveness of that Defendant's motion.

On June 14, 2000, the trial court entered an order providing for oral argument on June 21, 2000 in Baton Rouge. On June 15, 2000, the Plaintiffs filed a cross motion for summary judgment and an opposition

to the summary judgment of the City of Denham Springs, Jeff Wesley and Scott Jones and cross motion for summary judgment. On June 20, 2000, the trial court granted leave to Plaintiffs to amend their petition to add a party plaintiff, Bay Lane Inc. the alter ego of Tommy Perkins, asserting that, up until their filing of the motion for summary judgment, the Defendants had never raised the issue of improper party regarding the claim damages arising from the ownership of 436 Summer Street.

On June 21, 2000, the summary judgments were argued to the bench, at which time the trial court struck plaintiffs' cross motion for summary judgment as untimely. On June 22, 2000, Petitioners sought and on July 11, 2000 were granted leave for leave to file a post-hearing brief regarding city liability.

On June 27, 2000, the trial court entered its *Order* wherein all claims were dismissed except those arising under 42 USC §1983. On July 10, 2000, the trial court entered its *Order* granting in part and denying in part the motion for partial summary judgment of City of Denham Springs, Lieutenant Scott Jones, and Chief Jeff Wesley, and granting the motion for summary judgment of Mr. Robert Roshto.

On July 17, 2000, Petitioners filed a notice of appeal. On July 24, 2000, the trial court denied Plaintiffs motion for reconsideration from the June 21, 2000 *Order*. On December 21, 2000, the trial court granted the Petitioner's motion to certify orders of June 22, 2000 and July 1, 2000 for appeal. On January 15, 2001, Plaintiffs filed notice of appeal. This matter was then submitted to the Fifth Circuit Court of Appeals under Docket Number 00-31008.

On March 2, 2001, Petitioners submitted their original brief to the Fifth Circuit Court of Appeals. On March 28, 2001, Respondent Robert Roshto set forth his reply in his original brief to the Fifth Circuit. This was followed by the April 3, 2001 filing of the original brief of

Respondents Chief Jeff Wesley, Lieutenant Scott Jones, and the City of Denham, Springs.

On April 11, 2001, Petitioners filed their reply to the brief of Respondents Wesley, Jones, and the City. Thereafter, on April 17, 2002, Petitioners submitted their response to the brief submitted by Mr. Roshto. The matter was then set for oral argument on February 7, 2002.

On March 26, 2002, the Fifth Circuit, Judges Jones, Wiener, and Parker, issued its ruling. Writing for the appellate court, Judge Edith H. Jones affirmed the district court's granting of summary judgment on the § 1985 conspiracy claims raised by Petitioners Tommy Perkins and Nathalan Perkins; the granting of summary judgment on Tommy Perkins' § 1983 claims against the Denham Springs Defendants citing the qualified immunity of Chief Wesley; and the grant of summary judgment on Nathalan Perkins'§ 1983 claims other than the Fourth Amendment claims arising from her arrest and the search of her home, including her claims of Fifth and Sixth Amendment violations in connection with her arrest and for lost wages while Mr. Perkins' lounge was shut down.

The court of appeals further affirmed the district court's decision to remand the Petitioners' state law claims to the state court and the dismissal of Petitioner Eddie Oliver's claims except those against Respondent Robert Roshto. The Fifth Circuit did, however, reverse and remand the grant of summary judgment to Robert Roshto on the grounds of prescription as well as the district court's dismissal of the § 1988 claims of the Petitioners.

REASONS FOR GRANTING THE PETITION

In its handling of this matter, the appellate court has sanctioned and endorsed the district court's departure from the accepted and usual course of judicial

proceedings. For this compelling reason, exercise of this Honorable Court's supervisory power is appropriate to safeguard the rights of the Petitioners herein.

Regarding the Plaintiffs' claims against Chief Wesley, Lieutenant Jones, and the City of Denham Springs, the trial court stated that "Plaintiffs have fired [a] Section 1983 buckshot at the Denham Springs Chief of Police, a Denham Springs police officer, and the City of Denham Springs, (the Denham Springs defendants) claiming numerous civil rights violations arising out of [the] [P]laintiffs' attempts to renew a liquor license." (See App. B, Page 4). This observation by the trial judge may be explained by the fact that this matter was re-allotted on two previous occasions, making this the third trial judge to preside over this matter. Further, this matter was set for oral argument before the Petitioners had the opportunity to file their briefs in opposition, thus evidencing the trial court's having made its decision prior to assessing the Petitioners' contentions or hearing counsels' arguments on the issues. In any event, the obvious fact remains that the numerosity of the claims asserted in no way should serve to diminish the seriousness thereof and the harm occasioned thereby.

The ruthless actions of the Denham Springs defendants may only be characterized as a concerted effort to violate the constitutional rights of the Petitioners. At best, said defendants may only plausibly argue that said acts are an abuse of process. In either scenario, the undeniable result of the Denham Springs defendants' scheme is that the rights of the Petitioners to equal protection under the law were obliterated.

What motives said defendants had in initiating this systematic distortion of legal authority to the detriment of the Petitioners is unclear. What steadfastly remains, throughout the course of events leading the parties to the present juncture, is that the humiliation, the harassment, and the unwarranted persecution to which the Petitioners were subjected grossly offends the

principles of justice upon which the American notion of liberty was founded.

I. The court of appeal endorsed the trial court's abuse of discretion and misapplication of 28 U.S.C.A. § 1367 in remanding the entirety of state law claims while maintaining federal claims.

In affirming the trial court's decision to remand the Petitioners' state law claims to the state court, the appellate court adopted the error committed by the district court. 28 U.S.C.A. §1367(a) provides that, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." 28 U.S.C.A. §1367(a). Although, whether or not to exercise this jurisdiction is largely left to the discretion of the district court, as is provided in 28 U.S.C.A. § 1367(c)(2), when issues of state law predominate, this Court has instructed that district courts should deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine. City of Chicago v. International College of Surgeons, 522 U.S. 156, 118 S.Ct. 523, 139 L.Ed.2d 525 (12/15/97), citing Carnegie-Mellon University v. Cohill, 484 U.S. 343, 357, 108 S.Ct., 614, 623, 98 L.Ed.2d 720 (1988).

In support of its affirmation of the district court's declining jurisdiction over the Petitioners' state law claims, the appellate court cites the case of Bass v. Parkwood Hospital, 180 F.3d 234 (5th Cir. 7/1/99). In

affirming the dismissal of the plaintiff's claims due to the disposal of all federal question pending before the court, the court of appeal, nevertheless, noted that "this fact does not divest the court of jurisdiction: instead, the court must exercise its discretion whether to exercise supplemental jurisdiction over Bass's state law claims." Bass, at 246. This discretion to which the court of appeal refers has been addressed on numerous occasions by this and other circuits.

In the matter of In re Abbott Laboratories, 51 F.3d 524 (5th Cir. 4/24/95), a case which involved allegations of infant formula price-fixing, the Fifth Circuit Court of Appeal reasoned that the trial court's refusing to exercise supplemental jurisdiction over the unnamed plaintiffs' claims in that matter "reflects respect for considerations of comity, but it assumes that the claims of the class representatives were to be remanded to state court." "The [district] court must now adjudicate claims of the class representatives -- including the same novel and complex state law issues the district court preferred to leave to Louisiana." The Fifth Circuit concluded that the interests of comity will not be served by declining to exercise supplemental jurisdiction over the class members whose claims do not meet the jurisdictional amount. For that reason, it vacated the district court's order remanding the claims to the state court and remanded the matter back to the district court. 51 F.3d at 530.

In Batiste v. Island Records Inc., 179 F.3d 217, 226-27 (5th Cir. 1999), Judge King, writing for that Court, found that the proper standard of review of a district court's decision to decline jurisdiction over pendent state law claims is for an abuse of discretion. Batiste, however, involved a case where all claims save certain state law claims were dismissed; thus, the inquiry in that case fit neatly into the § 1367 (c)(3) exception, and this Court nevertheless found that failure to exercise pendent jurisdiction under the fact of that

case constituted an abuse of discretion. Nevertheless, in an action, such as the present, where the exceptional circumstances of subsection (c)(1-4) are not present, the standard of review should be de novo as applied to errors of law. Unless one of the subparts (1-4) of subsection (c) applies, § 1367 mandate pendent jurisdiction.

In Executive Software North America v. United States District Court, 24 F. 3d 1545 (9th Cir. 5/16/94), the plaintiff brought an employment discrimination suit against her employer under Title VII, 42 U.S.C.A. § 1983, and state law alleging that Executive Software required its employees to study the teachings of the Church of Scientology. After the action was removed to federal court, the district court remanded the state claims to the state court pursuant to what the district judge understood to be his discretion. See Id. at 1548. The court of appeals reversed, holding that the district court committed clear error in declining supplemental jurisdiction.

Discussing the 28 U.S.C.A § 1367 presumption toward adjudication of state claims, Judge Nelson, 24 F.3d at 1555, read Section 1367(a)'s use of "shall" as "confer[ring] power to entertain supplemental jurisdiction in mandatory terms" and he noted that jurisdiction may be declined only in one of the four specific circumstances enumerated in subsection (c). As this interpretation contradicted the common law doctrine, the court turned to the legislative history to support its deference to statutory construction. The court wrote, 24 F.3d at 1556:

> By selecting this statutory structure [the use of "shall" in subsection (a) and "may" in subsection (c)], it is clear that Congress intended section 1367 (c) to provide the exclusive means by which supplemental jurisdiction can be declined by a court. Not

only is this conclusion supported by the legislative history, but a contrary reading of the statute would appear to render section 1367 (c) superfluous.

The Court also referenced Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1285 n.14 (3rd Cir. 1993); Godfrey v. Perkin-Elmer Corp., 794 F. Supp. 1179, 1184 (D. N.H. 1992); Cedillo v. Valcar Enters. & Darling Del. Co., 773 F. Supp. 932, 939 (N.D. Tex. 1991), as expressing a similar understanding of both the statute and its legislative history. With the support of Congress and other courts, the Ninth Circuit suggested that federal courts must adjudicate supplemental claims unless one of subsection (c)'s factual predicates existed.

Judge Nelson reasoned, 24 F.3d at 1557, that "By codifying preexisting applications of Gibbs[1] in subsections (c)(1)-(3) . . . it is clear that Congress intended the exercise of discretion to be triggered by the court's identification of a factual predicate that corresponds to one of the section 1367 (c) categories." If none of the predicates are present, a court may not remand the state claims to state courts for efficiency reasons alone, as the lower court did in both Executive Software and in the present case. Overturning the lower court's decision, 24 F.3d at 1560, the Executive Software court found that "the lower court did not rely on the statute, but [instead on] Gibbs."

In the matter *sub judice*, the trial court was quoted as stating, "that's all that I, as of today, have jurisdiction over, having divested myself of any pendent jurisdiction for a number of reasons, all of which I don't propose to go into in any great detail other than to say that that is the way that the court will manage this case." Clearly, this statement connotes the trial court's erroneous failure to adhere to the provisions of § 1367,

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[1] United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

much less the ample jurisprudence both persuasive and binding. As such, the appellate court fell into similar error in affirming the trial court's decision.

Therefore, in light of the statutory provisions and the ample jurisprudence derived therefrom, the lower courts in this matter clearly fell into error in remanding the state claims to the Louisiana courts. Due to this deviation, the granting of certiorari is appropriate. Further, said granting will provide this Court an opportunity to more clearly define the standard to be employed for determining whether a district court has abused its discretion in declining to exercise its jurisdiction when confronted with a similar factual scenario.

II. The appellate court erred in affirming the trial court's granting of summary judgment on § 1985 conspiracy claims raised by Petitioners Tommy Perkins and Nathalan Perkins.

The court of appeals acknowledged that the district court implicitly granted summary judgment on the claims raised by Petitioners Tommy and Nathalan Perkins; however, with respect to those claims of Petitioner Adrienne Cobb, summary judgment was not entered being that issues of material fact precluded such.

The conspiracy alleged was asserted on behalf of all Plaintiffs. The Plaintiffs have argued and asserted that Mr. Perkins was the target of a conspiracy to force him out of business. Given the facts of this case, conventional wisdom dictates that, if questions of fact exist as to Ms. Cobb's conspiracy claims, then questions of fact must exist as the conspiracy claims asserted by The remaining Plaintiffs, including Mr. Perkins. The trial court, however, never specifically discussed Mr. Perkins' conspiracy claim and offered no explanation or legal basis for dismissing the § 1985 claims of Ms.

Perkins and Mr. Perkins.

This Court, in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), has established that the standard for granting summary judgment mirrors the standard for a directed verdict, which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Supra, at 250, 2511. On a motion for summary judgment, disputed issues of fact are resolved against the moving party. General Electric Company v. Joiner, 522 U.S. 136, 143, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997).

In its treatment of the § 1985 claims of Petitioners Tommy and Nathalan Perkins, neither the trial court nor the appellate court offered any substantive reason for granting summary judgment. The appellate court merely contends that the Petitioners herein have failed to produce sufficient evidence to establish a conspiracy existed to deprive them of their right to equal protection under the law. (App. A, Page 2).

The jurisprudence of this Court mandates that, on summary judgment, the inferences to be drawn from the underlying facts contained in the moving party's materials must be viewed in the light most favorable to the party opposing the motion. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158, 90 S.Ct. 1598, 1609 citing United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, (1962). Without addressing whether the Defendants had met their burden, the lower courts shifted the burden to the Petitioners and summarily dismissed their claims based upon the allegation that the Petitioners had failed to offer an adequate rebuttal.

For this reason, the lower courts fell into error in granting this motion for summary judgment. Further, the lower courts' deviation from the commonly established method of addressing a motion for summary judgment constitutes a significant departure from the well-established flow mandating that the initial burden

rests with the mover, which, if said party has established that no issue of material fact exists and said mover is entitled to judgment as a matter of law, shifts to the non-moving party. As such, certiorari is proper to remedy this irregularity.

III. The appellate court erred in affirming the district court's grant of summary judgment dismissing Petitioners Tommy Perkins' and Nathalan Perkins' § 1983 claims against the Denham Springs defendants arising from the local administrative proceedings.

On this issue, the trial court found as follows:

> All allegations by Tommy Perkins against the City of Denham Springs, Chief Wesley, and Scott Jones arising out of the administrative proceedings instituted by the City of Denham Springs are dismissed as a matter of law because Perkins has failed to come forth with evidence to suggest a constitutional deprivation. It is undisputed that there was never a hearing on this matter by the Denham Springs ABC and as such, there could not have been any constitutional deprivations resulting therefrom. Accordingly, those claims are dismissed and the Court turns to the only remaining viable claim by Perkins . . .

Considering that oral arguments were set before Plaintiffs even filed their opposition brief, the trial court failed to review Plaintiffs' evidence before reaching its conclusion on this issue. Plaintiffs produced proof on this issue demonstrating that, not only was Mr. Perkins subjected to ongoing administrative proceedings, but

that was compelled to take legal action to protect his rights including but not limited to obtaining a temporary restraining order, preliminary injunction, final injunction, and judgment declaring the Denham Springs ABC to be illegally constituted.

The facts cited above are abundantly supported by evidence:

- On May 1, 1996, the City of Denham Springs ABC held its first administrative hearing on revocation proceedings against Mr. Perkins. Agent Aimee was present and testified. The Denham Springs ABC recognized that its notice of hearing was improper and set a formal hearing on May 7, 1996.

- On May 7, 1996, the City of Denham Springs ABC held a second formal administrative revocation hearing for purpose of sanctioning Mr. Perkins. The City of Denham Springs ABC insisted upon holding the administrative hearing before the criminal matter even though being warned that such may be in violation of due process and Mr. Perkins' 5th Amendment right.

- On May 28, 1996, the City of Denham Springs ABC held a meeting to discuss a letter submitted on behalf of Mr. Perkins which provided:

> The notice fails to place Mr. Perkins on notice of the specific action that the Denham Springs ABC seeks to take, the statute or ordinance that Mr. Perkins has allegedly violated and **the statutory authority of the Denham Springs ABC to take any action on such matter.**

- On June 3, 1996, the City of Denham Springs ABC issued a formal notice of hearing "to determine whether or not the retail dealers alcohol permit . . . should be suspended or revoked" citing the exact same criminal statute violations under which the City of Denham Springs had instituted criminal proceedings against Mr. Perkins. Mr. Perkins again objected on various grounds one of which was the lack of the statutory authority for the City of Denham Springs ABC to proceed.

- On June 20, 1996, Mr. Perkins made a final appeal to the Mayor of Denham Springs to continue the June 24, 1996, administrative hearing because his counsel was not available on that date, which request was denied.

- On June 21, 1996, Mr. Perkins obtained a TRO against the City of Denham Springs ABC Board from taking further action against Mr. Perkins.

- On June 24, 1996, a member of the Denham Springs ABC Board declared that the "court ordered signed by Judge Jeffrey D. Hughes [state court judge issuing TRO] is invalidate." In the meantime, the D.S. ABC, which had no statutory authority to act and without the authority of law, continued the administrative hearing process to August 13, 1996.

- On July 16, 1996, the Denham Springs ABC set a date for an administrative hearing against Mr. Perkins for August 13, 1996. On July 18, 1996, since by state law a temporary restraining order (TRO) lapses in ten days, via certified mail the Denham Springs ABC issued yet another notice of hearing setting an evidentiary hearing before

Chief Wesley for August 13, 1996, 10:00 a.m.

- On July 23, 1996, Mr. Perkins obtained a second TRO against the City of Denham Springs ABC Board from taking further action against him while he was waiting for a hearing on a final injunction.

- On September 23, 1996, the 21st JDC in and for the State of Louisiana granted a final injunction against the Denham Springs ABC after finding the Denham Springs ABC was not authorized by law to act. Being illegally constituted, the Denham Springs ABC was disbanded and all proceedings instituted by the Denham Springs ABC against Mr. Perkins were discontinued.

Thus, it was legal error for the trial court to find "that there was never a hearing on this matter." This finding is offensive to this Court's holding in City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988), in which this Court found that, in order to state a claim for municipal liability under § 1983, a plaintiff's injury must be caused by a municipal policy promulgated by an individual having final decision-making authority. Final administrative action was precluded only because Mr. Perkins was able to obtain a permanent injunction against the City. To the extent that the trial and appellate courts may have found that, in the absence of final administrative disposition, no cause of action lies, such is a finding of a difference without a distinction. Mr. Perkins was compelled, at his expense, to obtain this injunction to prevent final adjudication.

In Meadowbriar home for Children, Inc. v. Gunn, 81 F.3d 521, 532-533 (5th Cir. 1996), the Fifth Circuit set forth four elements of proof on a § 1983 claim against a municipality as follows:

> Municipalities and cities qualify as persons liable to suit under § 1983.[2] If a § 1983 suit is brought against a city, the claim must be based upon the implementation or execution of a policy or custom which was officially adopted by that body's officers.[3] To support a claim based upon the existence of an official custom or policy, the Plaintiff must lead facts which show that 1) a policy or custom existed; 2) the governmental policymakers actually or constructively knew of its existence; 3) a constitutional violation occurred; and 4) the custom or policy served as the moving force behind the violation.[4]

Further enunciating the "official policy" language, the Fifth Circuit, in Matthias v. Bingley, 906 F.2d 1047, 1054 (5th Cir. 1990) (citing Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984)) explained:

> Official policy is:
> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

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[2]Citing Monell v. Dept of Social Services, 436 U.S. 658, 98 S.C 1028, 56 L.Ed.2d 611 (1978).

[3]Citing Krueger v. Reimer, 66 F.3d 75, 76 (5th Cir. 1995).

[4]Citing Palmer v. City of San Antonio, 810 F.2d 514, 516 (5th C 1987)

> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by official adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policymaking authority. Actions of officers or employees of a municipality do not render the municipality liable under Section 1983 unless they execute official policy as above defined.

The enactment and actions of the Denham Springs ABC undeniably fit both prongs of this test. This board was enacted and adopted by the City of Denham Springs, and the actions of Chief Wesley, Agent Aimee, Lieutenant Jones, and the City of Denham Springs were well known in their promotion of the City's agenda.

As a result of the ruthless efforts of these defendants, Mr. Perkins incurred significant legal costs associated with the defense on the charges lodged against him and the loss of rental income occasioned by the repeated delay in acting on the application of Ms. Cobb. Obviously, Ms. Cobb suffered from a loss of income as well. In addition, both have suffered general damages as a result of the stigma placed upon them as a result of the frivolous charges and harassment by the Denham Springs defendants.

Moreover, the City of Denham Springs and Chief Wesley, through the Denham Springs ABC pursued a consistent course of action against Mr. Perkins. Mr. Perkins' constitutional rights to due process, equal protection, right to notice, and to be free from malicious

prosecution were violated. The Denham Springs ABC and Chief Wesley had no jurisdiction to proceed against Mr. Perkins, and it was not reasonable, in the absence of statutory authority, especially where these matters were initially indicated, for these defendants to have thought differently or to have continued in their course of action.

Such actions of local authority are clearly in violation of the protections afforded to all persons under the Constitution of the United States. The appellate court's affirmation of the district court's apparent endorsement of these acts clearly qualifies as a gross deviation from the well-established function of the judiciary.

IV. Chief Jeff Wesley's refusal to return the property seized despite being ordered to do so by the state court does not qualify as "reasonable" so as to support a defense of qualified immunity.

With regard to Chief Wesley's action concerning the seized liquor, the fact that Chief Wesley did not personally seize the liquor, while troublesome, has never been the sole crux of Plaintiffs' complaint. The primary focus of the Petitioners' claim as it relates to Chief Wesley is his steadfast refusal and inexcusable delay in returning the wrongfully seized property. Plaintiffs were inconvenienced and offended that the City would refuse to return the seized property even after being ordered to do so by the court. While there is insufficient guidance in statute regarding compliance with a court order directing the return of seized property although, adherence to the order should impact the defense of qualified immunity and what is deemed to be a reasonable action by a state agent.

In Reitz v. County of Bucks, 125 F.3d 139 (3rd Cir. 1997), the Court faced a similar situation where

prosecutors defied a court order to return seized property. The Court analyzed the defense of qualified immunity by applying the two-prong theory outline in Karnes v. Skrutski, 62 F.3d 485 (3rd Cir. 1995), which required ascertaining whether the law was clearly established at the time of the alleged violation, ***and*** whether under the existing law an officer reasonably could have believed the conduct to have been permissible.

Applying this test, the Reitz Court found that the first prong presented a purely legal question, and the trial court determines as a matter of law what the law was and whether it was clearly established at the time of the violation. In Reitz, the district court determined that the prosecutors did not act in violation of any clearly established statutory or constitutional law and thus dismissed the claim on the grounds of qualified immunity, which the appellate court found erroneous.

The Third Circuit continued the analysis, 125 F. 3d at 147, writing:

> Although no statute or constitutional provision explicitly requires that the District Attorney's Office comply with a court order directing the return of improperly seized property within a reasonable amount of time, **it is incomprehensible that a prosecutor faced with such an order would not know that he should comply timely and that a failure to do so would undermine the authority of the court. Not only does the prosecutor have the obligation to duly comply with a judicial order, but there is the duty to avoid violating the rights of others.**

The same rationale applies to Chief Wesley, the

Chief of Police for the City of Denham Springs. The Reitz Court concluded that the assistant district attorneys should have known that their prolonged procrastination in complying with the court order would result in a violation of the plaintiffs' legally established rights.

Turning to the second prong, the Court questioned whether the prosecutors, having received the order directing the return of property to the plaintiffs, acted reasonably in failing to comply. In other words, did they act without unreasonable delay or if they did delay, did they do so justifiably. This second part of the qualified immunity test "requires application of the law to the particular conduct at issue, an inquiry which may require factual determinations if the nature of the conduct is disputed" according to Karnes, 62 F.3d at 492.

In the Reitz matter, the prosecutors asserted that they acted as quickly as possible to return the property to the rightful owners and that the delay was caused by disputes among individual members of the Reitz family regarding the ownership of the property. The plaintiffs concede that they initially disagreed over the ownership of certain items but asserted that they quickly stipulated to the ownership of several items of improperly-seized property and the District Attorney's Office still did not return the property to them until almost a year after the entry of the court order. The plaintiffs further allege that during this delay certain items of property suffered a diminution in value while other items were destroyed due to mismanagement by the defendants. This presented a dispute of material facts to the Court concerning the reasonableness of the prosecutors' conduct and therefore, the Court held, 125 F. 3d at 147:

> They [the prosecutors] are not entitled to qualified immunity as a matter of law. Thus, we must vacate the grant of summary judgment on the qualified

immunity issue in favor of Rubenstein, Moore, and Gambardella and remand the matter to the district court for further proceedings on the § 1983 claim consistent with this opinion.

In this case, after being order to return the seized items, Chief Wesley contended they were contraband and refused to return them to Mr. Perkins. No arrangements could be made with Chief Wesley to return the items. Eventually, Mr. Perkins had to send his attorney to recover the items, which were then defiantly placed in the middle of the lobby floor at the police station. No one would help move the items and the attorney, who was pregnant, could do no lifting. Eventually, Mr. Ellis Chavers, the City Treasurer, was called by counsel and came over and loaded the bottles into counsel's vehicle.

Chief Wesley acted unreasonably. He had no basis in law to declare the items contraband. This Court should apply the rationale of the Reitz case to this action and reverse the granting of qualified immunity to Chief Wesley.

CONCLUSION

For the reasons set forth herein, the foregoing Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

A. Opinion of the court of appeal

B. Order of the trial court

C. Order of the trial court for oral argument

U.S. COURT OF APPEALS
FILED
MAR 26 2002
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-31008

ADRIENNE COBB; ET AL;

ADRIENNE COBB; EDDIE OLIVER; TOMMY PERKINS NATHALAN PERKINS,

Plaintiffs-Appellants,

versus

ROBERT ROSHTO; RAYMOND HOLLOWAY; TERRY E. PITRE; MURPHY J. PAINTER; SAN GARAFOLA; AIMEE, Agent; JEFF WESLEY; SCOTT JONES; CITY OF DENHAM SPRINGS,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
Civil Docket #98-CV-622-C

Before JONES, WIENER, and PARKER, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

The court has carefully considered this appeal in light of the briefs, oral argument and pertinent portions of the record. Having done so, we conclude that it is

unnecessary to recite the history of the case, as the parties are well familiar with it, and that the issues raised by appellants should be resolved as follows.

1. We affirm the implicit grant of summary judgment on § 1985 conspiracy claims raised by Tommy Perkins and Nathalan Perkins.' This court is empowered to sustain a summary judgment- on any ground asserted in the record below and sustained by the evidence. Lady v. Neal Glaser Marine, Inc., 228 F.3d 598, 601 (5th Cir. 2000). . Appellants point to no summary judgment evidence, other than their self-serving assertions in affidavits, that supports an inference of invidious motivation, i.e. a motivation by the Denham Springs defendants (the City, Jeff Wesley and Scott Jones) to deprive Tommy and Nathalan Perkins of equal protection of the laws. For lack of proof of this element of a § 1985 claim, summary judgment is proper. Hilliard v. Ferguson, 30 F.3d 649, 652-53 (5th Cir. 1994)

2. We affirm the grant of summary judgment on Tommy Perkins's § 1983 claims against the Denham Springs defendants. With regard to his claims arising from a local administrative proceeding, the district court correctly held that, as there was never a hearing (and the proceeding was dismissed by state court order), there could be no constitutional deprivations

[1]The appellees do not cross-appeal the court's July 22, 2000 order that apparently preserved any § 1985 claims Adrienne Cobb might have asserted against the Denham Springs defendants.

The claims concerning the seizure of Perkins's liquor and the alleged failure to return the liquor promptly fail because of Chief Wesley's qualified immunity. The Chief had at least arguable probable cause for his actions, precluding a finding that his actions were objectively unreasonable in light of established constitutional law. Anderson v. Creighton, 483 U.S. 635, 640 (1987)

3. We affirm the grant of summary judgment on Nathalan Perkins' § 1983 claims for the incidents other

than the Fourth Amendment claims arising out of her arrest and the search of her home. The district court's dismissal thus includes Nathalan's claims for Fifth and Sixth Amendment violations in connection with her arrest and for lost wages while Tommy Perkins's lounge was shut down. There is no evidence to sustain the former alleged constitutional violations, and there is no constitutional claim for lost wages under these circumstances.

4. We reverse and remand the grant of judgment to Robert Roshto on grounds of prescription. The state court proceedings do not support the district court's finding that the state case against Roshto was dismissed on an exception of improper cumulation. Instead, the amended petition in state court interrupted prescription against Roshto.

5. We reverse and remand the district court's dismissal of § 1988 claims brought by appellants, solely to the
extent that if appellants prevail on any of their claims, they may recover attorneys' fees and cost under § 1988.

6. We affirm the district court's discretionary decision to remand appellants' state law claims to the state court. Under the federal statute, 28 U.S.C. § 1367(c)(2), the court may decline to exercise supplemental jurisdiction over state law claims if they "substantially predominate" over the federal claims. Bass v. Parkwood Hospital, 180 F.3d 234 (5th Cir. 1999). Taking into account our reversal of summary judgment for Roshto, the dozen or more state law nevertheless continue to "substantially predominate" in number, variety, and complexity. The district court did not abuse his discretion.

7. We affirm the dismissal of Eddie Oliver's claims other than any claim pending against Robert Roshto.

AFFIRMED in part, **REVERSED** in part and

REMANDED.

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

FILED

U.S. DIST. COURT

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By DEPUTY CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ADRIENNE COBB, et al	CIVIL ACTION
VERSUS	NUMBER 98-622-C-M2
ROBERT ROSHTO, et al	JUDGE PETER BEER

ORDER

This matter came for hearing Wednesday, June 21, 2000,on two separate motions for summary judgment filed by the defendants in this action. After consideration of the motions, the oppositions thereto, the evidence submitted, and the applicable law, the Court rules as follows:

I. ROBERT ROSHTO

Robert Roshto seeks summary judgment on the basis that the claims against him have prescribed and alternatively, that he is entitled to qualified immunity. Plaintiffs do not deny that the claims against Roshto have prescribed on their face, but instead contend that prescription was interrupted by the filing

of a lawsuit in state court.

Although 42 U.S.C. § 1983 contains no statute of limitations, the analogous state law statute of limitations for personal injuries and the closely related state laws governing the tolling of the state are to be applied in such cases. Wilson v. Garcia 471 U.S. 261 (1985). In Louisiana, the prescriptive period is one year. La. Civ. Code art. 3492. It is undisputed that this suit filed in federal court on July 20, 2998 has prescribed on its face. [5]

Plaintiffs contend that prescription was interrupted, in accordance with Louisiana Civil Code article 3462, by the filing of a second amended petition in a state court lawsuit entitled Cobb v. Commissioner, Dept. of Public Safety, et al (CA No. 77,310). The original petition was termed a "Writ of Mandamus for Summary Proceeding on Issuance of Alcoholic Beverage Permit." The plaintiff is Adrienne Cobb and the defendants are the State of Louisiana and the Denham Springs Alcohol Beverage Control Board. The suit sought review of the denial of a liquor license and damages resulting therefrom.[6]

In the second amended petition, which is almost identical to the complaint filed in this case, Adrienne Cobb added Tommy Perkins, Eddie Oliver and Nathalan Perkins as plaintiffs. Cobb also named various members of the Louisiana Alcohol Beverage Control board, Robert Roshto, the City of Denham Springs, its Chief of Police, and various police officers as defendants claiming numerous civil rights violations, conspiracy, malicious prosecution, and abuse of process. However, according to the evidence submitted, the amended petition was dismissed on an exception of improper cumulation.

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[5]At the latest, the prescriptive period began to run as to the claims against Roshto when the Supreme Court denied writs in Eddie Oliver v. ABC, (CA No. 73,001) on May 31, 1996.

[6]Although Oliver v. ABC was consolidated with Cobb v. ABC at one point, that consolidation order was subsequently vacated.

The comments to La. Civ. Code art. 3462 explain that "[t]he filing of suit in a competent jurisdiction and venue interrupts any kind of prescription as to the causes of action therein sued upon, provided that the plaintiff is a proper party plaintiff and the defendant is a proper party defendant." La. Civ. Code art. 3462, Revision Comments(b). Moreover, case law suggests that the prescriptive period is only interrupted as to the causes of action filed in the earlier suit. See Ford v. Stone, 599 F. Supp. 693, 695-96 (M.D. La. 1984), aff'd 774 F.2d 1158 (5th Cir. 1985)(holding that plaintiff's state court petition failed to raise federal claims in a manner sufficient to interrupt prescription). See Louviere v. Shell, 440 So.2d 93, 96 (La. 1983). (holding that suit by a second party which states a different cause of action than the suit by the first party, does not interrupt prescription, although each cause of action is based on common facts). Thus, prescription is interrupted only as to the defendants named in the state court suit and as to the causes of action asserted therein.

Here, the amended petition was disallowed. The state district court found that adding new plaintiffs and new defendants under various theories of law to an appeal of the denial of a permit amounted to improper cumulation. The First Circuit upheld the trial court's ruling, stating that the proper course of action is to allow plaintiff to amend her petition and delete one of the actions, or for the trial court to sever the claims. Although the record is not clear as to the subsequent action in the state court proceeding, it is evident that the parties and claims asserted in the second amended petition were not properly before the state court.

The party claiming interruption of prescription bears the burden of proving that interruption occurred. Spott v. Otis Elevator Co., 601 So.2d 1355 (La. 1992). Plaintiffs have not come forth with evidence that Robert Roshto was a defendant in that state court action so as to interrupt prescription. Accordingly, all claims against Robert Roshto have prescribed and are dismissed with prejudice.

II. CITY OF DENHAM SPRINGS, JEFF WESLEY, AND SCOTT JONES

Plaintiffs have also fired Section 1983 buckshot at the Denham Springs Chief of Police, a Denham Springs police officer, and the City of Denham Springs (the Denham Springs defendants) claiming numerous civil rights violations arising out of plaintiffs' attempts to renew a liquor license. The Denham Springs defendants seek summary judgment on all claims except for two which they acknowledge involve issues of fact not ripe for summary judgment.

Section 1983 constitutional deprivations are serious business. They have no whimsical or clever side. They address the most basic of our constitutional protections and are entitled to be taken in a deadly serious vein. Because of this, the allegations that plaintiff stands ready to prove must also be considered serious business. For a plaintiff (or his counsel) to see Section 1983 as a sort of federal grab bag whereby one makes his way onto the field of battle with the hope of visiting a sort of trip and fall victory over his opponent is inappropriate. Accordingly, the Court, after consideration of the arguments of counsel, the evidence submitted on both sides and the applicable law, rules as follows on the claims asserted by each plaintiff.

A. Tommy Perkins

The following facts are undisputed. Perkins is the owner of the property where the lounge is located and also the owner of the Perkins Motel which is adjacent to the lounge. In April 1996, state ABC officer, Mike Aimee, conducted a search of Adrienne Cobb's business. He also searched the Perkins Motel, including Tommy Perkins' office, and found what is considered to be a large stash of various alcohol containers. Because Cobb's business only had a beer permit, Aimee contacted the Denham Springs police chief, John Wesley, who seized the liquor and charged Perkins with violations of the Louisiana alcohol Beverage Control law. The seizure was subsequently founded by the state court to have been illegal and in violation of the

Fourth Amendment because the properties, although adjoining, were separate businesses. (See plaintiff's exhibit G)

After the liquor was seized, the Denham Springs ABC Board, chaired by Chief Wesley, requested Perkins to attend a meeting of the Denham Springs ABC Board to discuss his business, Perkins' Restaurant and Lounge. Although the Denham Springs ABC Board re-noticed the meeting several times, the meeting never occurred because Perkins successfully challenged in state court the authority of the Denham Springs ABC Board.

The illegal seizure and the subsequent administrative process is the basis of Perkins' Section 1983 claims against the Denham Sprigs defendants. The state agent who conducted the search, Mike Aimee, is not a defendant. However, Perkins contends that Chief Wesley violated his Fourth Amendment right to be free from illegal search and seizure; his Fifth Amendment right against self incrimination; his Sixth Amendment right to "notice of nature and cause of accusations against him" and "right to be prosecuted for any alleged criminal act in a court of proper jurisdiction"; his Fourteenth Amendment rights to due process, equal protection, and to be free from malicious prosecution.

All allegations by Tommy Perkins against the City of Denham Sprigs, Chief Wesley, and Scott Jones arising out of the administrative proceedings instituted by the City of Denham Springs are dismissed as a matter of law because Perkins has failed to come forth with evidence to suggest a constitutional deprivation. It is undisputed that there was never a hearing on this matter by the Denham Springs ABC and as such, there could not have been any constitutional deprivations resulting therefrom. Accordingly, those claims are dismissed and the Court turns to the only remaining viable claim by Perkins arising under the Fourth Amendment illegal search and seizure to which defendants lead qualified immunity.

QUALIFIED IMMUNITY

Qualified immunity protects officials in the course of performance of their discretionary duties unless their conduct violates a "clearly established (federal) statutory or constitutional right [ ] of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Evans v. Ball, 168 F.3d 856 (5th Cir. 1999); Sorenson v. Ferrie, 134 F.3d 325 (5th Cir. 1998). To assess whether defendants are entitled to immunity, we must first determine whether a plaintiff has alleged the violation of a clearly established constitutional right. See Siegert v. Gilley, 500 U.S. 226, 231 (1991). If we find a right to be clearly established, we then must examine the objective legal reasonableness of the official's conduct under the circumstances, "in light of clearly established law and the information the [] officers possessed." Anderson v. Creighton, 483 U.S. 635, 640 (1987). The application of the "objectively reasonable" standard is a question of law for the Court unless there are "underlying historical facts in dispute that are material to the resolution of the question whether the defendants acted in an objectively reasonable manner." Mangieri v. Clifton, 29 F.3d 1012 (5th Cir. 1994).

The facts surrounding the seizure of the liquor are not in dispute and the Court finds that plaintiff has stated a violation of a clearly established constitutional right - the right to be free from illegal search and seizure. Plaintiff contends that there was no reasonable basis for the officer or Chief Wesley to assume that the alcohol was contraband because the licensed premises was in another separate building; Chief Wesley contends that his conduct was reasonable because Perkins "was not licensed to have hard liquor on his premises [which] was clearly a violation of law." After a review of the summary judgment evidence, the Court finds that as a matter of law, Chief Wesley's actions were objectively reasonable in light of the circumstances. The bar/lounge and the Perkins Motel were situated on the same property owned by Tommy Perkins. Tommy Perkins did not have a license to sell hard liquor. Large amounts of alcohol were found. Although the state court ultimately suppressed the seized

alcohol, it cannot be said that the seizure of the alcohol was objectively unreasonable. Qualified immunity protects an official whose conduct was objectively reasonable, even if the conduc infringed upon the plaintiff's constitutional rights. See Anderson, 4893 U.S. at 641. Accordingly, the Court finds that Chief Wesley is entitled to qualified immunity in this instance.

B. Adrienne Cobb

The Denham Springs defendants have acknowledged that issues of fact regarding the Fourth Amendment claims asserted by Adrienne Cobb and Nathalan Perkins preclude summary judgment at this time. However, the Denham Springs defendants contend that summary judgment is appropriate on all other claims asserted by these plaintiffs.

Adrienne Cobb claims that Officer Scott Jones, Chief Wesley and the City of Denham Springs participated in a conspiracy to close her business in violation of 42 U.S.C. § 1985(3). She contends that the search of her home, her arrest, and the delay in issuing her alcohol permit was part of the conspiracy and resulted in violations of her civil rights. She also claims Fourteenth Amendment violations of due process, equal protection, and freedom from malicious prosecution. Because there appear to be factual issues to be resolved concerning these claims, the Court denies summary judgment as to all claims raised by Adrienne Cobb at this time.

C. Nathalan Perkins

The only viable claims by Nathalan Perkins are those arising out of her arrest and the search of her home. All other claims by this plaintiff relating to the businesses located on Tommy Perkins' property are insupportable and are hereby dismissed with prejudice.

D. Eddie Oliver

The Denham Springs defendants seek summary judgment on the claims by Eddie Oliver contending that Oliver admitted

he is not pursuing any claims against the City of Denham Springs, Chief Wesley or Scott Jones. Without any apparent opposition, the Court grants summary judgment and dismisses the claims of Eddie Oliver against the Denham Springs defendants.

For these reasons, the Motion for Summary Judgment filed by Robert Roshto is GRANTED. The Motion for Summary Judgment filed by the Denham Springs defendants is GRANTED IN PART and DENIED IN PART.

New Orleans, Louisiana, this _5th day of July, 2000.

s/Peter Beer
Peter Beer
United States District Judge

Minute Entry
Beer, J.
June 14, 2000

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ADRIENNE COBB, et al	*	CIVIL ACTION
VERSUS	*	NUMBER 98-622-C-M2
ROBERT ROSHTO, et al	*	JUDGE PETER BEER

The Motion for Summary Judgment filed by Robert Roshto and the Motion for Summary Judgment filed by the City of Denham Springs, Jeff Wesley and Scott Jones are set for hearing on **June 21, 2000 at 10:30 a.m.** in the United States District Court, 777 Florida Street, Baton Rouge, Louisiana. Oral argument is requested. All parties are invited to attend and participate as they deem appropriate.

S/ P.B.